PUBLICATION INFORMATION:

Phillips Kiln Services, Ltd. v. International Paper Co., 2002 WL 1712870 (N.D. Iowa June 3, 2002) (Unpublished decision)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

PHILLIPS KILN SERVICES, LTD., Plaintiff, vs. INTERNATIONAL PAPER COMPANY, Defendant.	No. C02-4005-MWB **MEMORANDUM OPINION AND ORDER REGRADING DEFENDANT'S MOTION TO DISMISS SECOND CLAIM**

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I. INTRODUCTION

On February 5, 2002, plaintiff Phillips Kiln Services, Ltd. ("Phillips Kiln") filed this action against defendant International Paper Company ("International Paper"). Plaintiff Phillips Kiln asserts two claims against International Paper which relate to work performed by Phillips Kiln for International Paper. Plaintiff Phillips Kiln's first claim is for breach of an express services contract between Phillips Kiln and International Paper for certain work to be performed on a lime kiln at International Paper's paper and pulp mill in Erie, Pennsylvania. Plaintiff Phillips Kiln's second claim is for *quantum meruit*, or breach of an implied-in-fact contract, for services provided to International Paper from May 2001 to July 2001.

On March 20, 2002, International Paper filed a motion to dismiss Phillips Kiln's claim for *quantum meruit* or breach of an implied-in-fact contract.[1] In its motion to

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[1]Phillips Kiln specifies that its second claim is one for *"QUANTUM MERUIT* (BREACH OF IMPLIED IN FACT CONTRACT)." A contract implied in fact is an actual contract which arises when parties agree upon the obligation to be incurred, but their intention is not expressed in words and is, instead, inferred from their actions in light of the surrounding circumstances. *Department of Environmental Resources v. Winn*, 597 A.2d 281, 284, n.3 (Pa. Commw. Ct. 1991). A contract implied in law, or quasi-contract, is a duty imposed by law upon a person who has obtained property or services under circumstances where reason, common sense and justice dictate that payment should be made therefor. *Garofolo v. Commonwealth, Department of Revenue*, 648 A.2d 1329, 1334 (Pa. Commw. Ct. 1994). Confusion in this area arises because courts use *quantum meruit* in connection with either a contract implied in law or a contract implied in fact. *Compare Iowa Waste Sys., Inc. v. Buchanan County*, 617 N.W.2d 23, 29 n.4 (Iowa Ct. App. 2000) ("As the term quantum meruit is not only antiquated but inevitably breeds confusion, the preferred phrase for asserting such a cause of action is an implied-in-fact contract."), with *Murray Hill Publ'n, Inc. v. ABC Communications, Inc.*, 264 F.3d 624, 638 (6th Cir. 2001) (noting that "Michigan courts have held that where a party seeks to enforce an oral agreement, the court will equate 'recovery under the equitable theory of contract implied in law with recovery in quantum meruit.'"), *Hershey Food Corp. v. Ralph Chapek, Inc.*, 828 F.2d 989, 997 (3rd Cir. 1987) ("*Quantum meruit* is a quasi-contract remedy in which a contract is implied-in-law under a theory of unjust enrichment; the contract is one that is (continued…)

dismiss, International Paper seeks dismissal of the *quantum meruit* claim on the ground that the breach of contract claim and the *quantum meruit* claim are mutually exclusive and a party that pleads a breach of express contract claim cannot recover under a *quantum meruit* claim. Phillips Kiln filed a timely resistance to International Paper's Motion To Dismiss in which it asserts that it is not seeking to recover for the same work under both its breach of contract and *quantum meruit* claims. As a result, Phillips Kiln contends that its two claims are not mutually exclusive and the court should deny International Paper's Motion To Dismiss. Phillips Kiln argues that even if a party who pleads an express contract cannot recover under a *quantum meruit* claim, this does not foreclose a party from pleading these as separate, alternative theories.

Although the court initially granted defendant International Paper's request for oral arguments on its motion to dismiss, after an examination of the briefs and the record, the court has concluded that oral argument is unnecessary. The court turns first to a discussion of facts alleged in the complaint then to the standards applicable to motions to dismiss and, finally, to the legal analysis of whether Philips Kiln has alleged a claim for *quantum meruit* upon which relief may be granted.

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[1](…continued)
implied in law, and 'not an actual contract at all.'") (quoting *Ragnar Benson, Inc. v. Bethel Mart Assocs.*, 454 A.2d 599, 603 (Pa. Super. Ct. 1982); *Paschall's, Inc. v. Dozier*, 407 S.W.2d 150, 154 (Tenn. 1966) (explaining that unjust enrichment, quasi contract, quantum meruit, and contracts implied at law all describe "that class of implied obligations where, on the basis of justice and equity, the law will impose a contractual relationship between parties, regardless of their assent thereto.") and *Winn*, 597 A.2d at 284 (noting that implied-in-law contracts comprise quasi contractual claims, including claims in quantum meruit)). For the sake of simplicity, the court will refer to plaintiff Phillips Kiln's second claim as one for *quantum meruit*.

II. FACTUAL BACKGROUND

The factual background for disposition of these motions is based entirely on the facts as alleged in the complaint.

Plaintiff Phillips Kiln is an Iowa Corporation with an office located in Sioux City, Iowa. Defendant International Paper is a New York Corporation, with its principal office located in Purchase, New York. On February 7, 2001, Phillips Kiln and International Paper executed a Services Contract.[2] The contract provided that Phillips Kiln would provide all supervision, labor, equipment, and tools necessary to perform a lime kiln shell replacement at International Paper's mill at Erie, Pennsylvania. The contract provided that International Paper would pay Phillips Kiln for the services covered under the contract based on Phillips Kiln's proposal.[3] The proposal provides that the scope of the job would include:

> PRE-JOB:
>
> 1. Arrive at plant site. Review job scope and safety requirements with customer representatives.
> 2. Remove roof and sides of building over kiln as required.
>
> MAIN JOB:
>
> 1. Set up equipment and any necessary cribbing, slide tire #2 uphill.
> 2. Install necessary spider bracing on the inside of the kiln next to the cut lines.
> 3. Mark cut lines outside of kiln shell.
> 4. Cut and remove designated portions of old kiln shell section.
> 5. Set new shell section into position and align seams with adjusting hardware.

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[2] A copy of the Services Contract is attached to the complaint as Exhibit "A."

[3] A copy of Phillips Kiln's proposal and addendum are attached to the complaint as Exhibit "B."

6. Remove spider bracing and any necessary cribbing.
7. Take radial runouts on section.
8. Weld outside field joint(s). Back gouge and weld inside field joints.
9. Push the #1 tire off.
10. Remove the old filler bars and weld repair any shell cracks on a time and material basis.
11. Determine the amount of new filler bar thickness, start installing some of the new bars.
12. Slide the tire back into place and install the remaining filler bars.
13. Dial the tire in for minimum runouts.
14. Install the retaining hardware.
15. Remove the carry rolls from the #1 pier.
16. Jack hammer out old grout and concrete as needed.
17. Lift base and acid wash pier top.
18. Set shim packs into place and position base.
19. Pour new concrete and grout. Allow 24 hours to cure.
20. Reset the carrying rollers.
21. Clean up work area, present job for approval, tear down equipment, and load out.

Complaint, Ex. B at 2-3.

Commencing in May of 2001, Phillips Kiln performed various work for International Paper, including the replacement of a lime kiln shell, the replacement of filler bars, resetting the base of a lime kiln, in addition to other work related to the kiln. Phillips Kiln billed International Paper for the services it performed and demanded payment for the services. International Paper has refused to make payment to Phillips Kiln.

III. LEGAL ANALYSIS

A. Standards Governing 12(b)(6) Motion To Dismiss

Federal Rule of Civil Procedure 12(b)(6) provides:

> (b) Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: . . . (6) failure to state a claim upon which relief can be granted. . . .

FED. R. CIV. P. 12(b)(6).

"A dismissal under Federal Rule of Civil Procedure 12(b)(6) is essentially a ruling on a question of law." *North Star Int'l v. Arizona Corp. Comm'n*, 720 F.2d 578, 580 (9th Cir. 1983) (citing *Yuba Consolidated Gold Fields v. Kilkeary*, 206 F.2d 884, 889 (9th Cir. 1953)). In considering a motion to dismiss for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6), the court must accept the complaint's factual allegations as true and construe them in the light most favorable to the plaintiff. *Botz v. Omni Air Int'l*, 286 F.3d 488, 489 (8th Cir. 2002); *accord Cruz v. Beto*, 405 U.S. 319, 322 (1972); *Meyer v. City of Joplin*, 281 F.3d 759, 760 (8th Cir. 2002); *Young v. City of St. Charles*, 244 F.3d 623, 627 (8th Cir. 2001); *Whitmore v. Harrington*, 204 F.3d 784, 784 (8th Cir. 2000); *Anderson v. Franklin County, Mo.*, 192 F.3d 1125, 1131 (8th Cir. 1999); *Gross v. Weber*, 186 F.3d 1089, 1090 (8th Cir. 1999); *Midwestern Mach. v. Northwest Airlines, Inc.*, 167 F.3d 439, 441 (8th Cir. 1999); *Valiant-Bey v. Morris*, 829 F.2d 1441, 1443 (8th Cir. 1987). A complaint should be dismissed under Rule 12(b)(6) only if, taking the allegations as true, "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984); *Knapp v. Hanson*, 183 F.3d 786, 788 (8th Cir. 1999) ("A motion to dismiss should be granted only if 'it appears beyond doubt that the plaintiff can prove no set of facts which would entitle him to relief.'") (quoting *Morton v. Becker*, 793 F.2d 185,

187 (8th Cir. 1986), and citing *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)). This court also observes that a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) does not test whether the plaintiff will prevail on the merits, but rather tests whether the plaintiff has properly stated a claim upon which relief can be granted. *See Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974).

Furthermore, pertinent to this 12(b)(6) motion, the court is mindful that in treating the factual allegations of a complaint as true pursuant to Rule 12(b)(6), "the court is free to ignore legal conclusions, unsupported conclusions, unwarranted inferences and sweeping legal conclusions cast in the form of factual allegations." *Wiles v. Capitol Indemnity Corp.*, 280 F.3d 868, 870 (8th Cir. 2002); *Silver v. H & R Block, Inc.*, 105 F.3d 394, 397 (8th Cir. 1997) (noting that the court must "reject conclusory allegations of law and unwarranted inferences."); *Westcott v. City of Omaha*, 901 F.2d 1486, 1488 (8th Cir. 1990) (the court "do[es] not, however, blindly accept the legal conclusions drawn by the pleader from the facts," citing *Morgan v. Church's Fried Chicken*, 829 F.2d 10, 12 (6th Cir. 1987), and 5 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1357, at 595-97 (1969)); *see also LRL Properties v. Portage Metro Hous. Auth.*, 55 F.3d 1097, 1103 (6th Cir. 1995) (the court "need not accept as true legal conclusions or unwarranted factual inferences," quoting *Morgan*, 829 F.2d at 12). Conclusory allegations need not and will not be taken as true; rather, the court will consider whether the facts alleged in the complaint, accepted as true, are sufficient to state a claim upon which relief can be granted. *Silver*, 105 F.3d at 397; *Westcott*, 901 F.2d at 1488. The court will apply these standards to International Paper's motion to dismiss Phillips Kiln's *quantum meruit* claim.

B. Analysis

International Paper contends that Phillips Kiln's *quantum meruit* claim should be dismissed because the breach of contract claim and the *quantum meruit* claim are mutually

exclusive and a party that pleads a breach of express contract claim cannot recover under a *quantum meruit* claim.[4] Phillips Kiln responds that because it is not seeking to recover for the same work under both its breach of contract and *quantum meruit* claims, the two claims are not mutually exclusive. Moreover, Phillips Kiln argues that even if a party who pleads an express contract cannot recover under a *quantum meruit* claim, this does not foreclose a party from pleading these theories alternatively.

1. Mutually Exclusive Claims

Quantum meruit is an implied contract remedy based on the prevention of unjust enrichment. *See Allegeheny General Hosp. v. Phillip Morris, Inc.*, 228 F.3d 429, 447 (3rd Cir. 2000) ("'Quantum meruit is a quasi-contractual remedy in which a contract is implied-in-law under a theory of unjust enrichment'") (quoting *Hershey Foods Corp. v. Ralph Chapek, Inc.*, 828 F.2d 989, 998-99 (3d Cir. 1987) (quoting in turn *Ragnar Benson, Inc. v. Bethel Mart Assocs.*, 454 A.2d 599, 603 (Pa. Super. Ct. 1982)); *Mitchell v. Moore*, 729 A.2d 1200, 1202 (Pa. Super. Ct. 1999) ("A cause of action in quasi-contract for

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[4]The parties agree that the court need not make a determination as to a choice of laws in this case because there is no conflict between Iowa and Pennsylvania law on the issues raised by defendant International Paper's motion. The court agrees that there is no "true conflict" between the law of Iowa and the law of Pennsylvania as to the issues before the court on defendant International Paper's motion and therefore the court need not make a choice of law decision. *See Phillips v. Marist Soc'y*, 80 F.3d 274, 276 (8th Cir. 1996) ("[B]efore entangling itself in messy issues of conflict of laws a court ought to satisfy itself that there actually is a difference between the relevant laws of the different states."); *Nesladek v. Ford Motor Co.*, 46 F.3d 734, 736 (8th Cir. 1995) (first question was whether there was a "true conflict of laws," and where there was no doubt that case presented a "true conflict," court turned to consideration of which jurisdiction's law should apply under Minnesota conflict-of-laws rules); *Cleary v. News Corp.*, 30 F.3d 1255, 1265 (9th Cir. 1994) (court must first determine whether "true conflict" exists between the laws of the jurisdictions); *Harlan Feeders, Inc. v. Grand Labs., Inc.*, 881 F. Supp. 1400, 1405 (N.D. Iowa 1995) (noting that before any choice of law need be made, there must be a "true conflict" between the laws of the possible jurisdictions on the pertinent issue).

quantum meruit, a form of restitution, is made out where one person has been unjustly enriched at the expense of another."); *Feingold v. Pucello*, 654 A.2d 1093, 1095 (Pa. Super. Ct. 1995) ("A cause of action in quasi-contract for quantum meruit, a form of restitution, is made out where one person has been unjustly enriched at the expense of another."); *Chariton Feed and Grain, Inc. v. Harder*, 369 N.W.2d 777, 791 (Iowa 1985) (noting that "the remedy of unjust enrichment or *quantum meruit* is based on the concept of implied contract. . ."). As a result, generally one who pleads an express contract cannot recover under *quantum meruit*. *Giese Constr. Co. v. Randa*, 524 N.W.2d 427, 431 (Iowa Ct. App. 1994) ("One who pleads an express oral contract cannot ordinarily recover under an implied contract or quantum meruit."); *accord Rogers v. Webb*, 558 N.W.2d 155, 158 (Iowa 1997) ("As a general rule in Iowa one who pleads an express contract 'cannot ordinarily recover upon an implied contract or *quantum meruit*.'"); *Hershey Foods Corp.*, 828 F.2d at 999 ("Where an express contract governs the relationship of the parties, a party's recovery is limited to the measure provided in the express contract; and where the contract 'fixes the value of the services involved,' there can be no recovery under a *quantum meruit* theory."); *Chariton Feed and Grain, Inc.*, 369 N.W.2d at 791 (holding that "in this jurisdiction the law will not imply a contract where there is an express contract. An express contract and an implied contract cannot exist with respect to the same subject matter, and the former supercedes the later.") (citations omitted); *Sammon v. Roach*, 235 N.W. 78, 79 (Iowa 1931) (noting that "if the cause of action is based upon contract, recovery may not be had upon the theory of *quantum meruit*."); *see also Mediterranean Enters., Inc. v. Ssangyong Corp.*, 708 F.2d 1458, 1464 (9th Cir. 1983) ("An action does not lie on an implied contract where there exists between the parties a valid express contract which covers the identical subject matter.").

Defendant International Paper bases its motion to dismiss on the supposition that Phillips Kiln is seeking to recover under an express contract theory as well as *quantum*

meruit for the same services Phillips Kiln rendered to International Paper. Such a recovery is clearly impermissible. *See Hershey Foods Corp.*, 828 F.2d at 999; *Chariton Feed and Grain, Inc.*, 369 N.W.2d at 791.

International Paper's theorem is not unreasonable given the paucity of facts alleged in the complaint. Paragraph four of the complaint details the following work performed by Phillips Kiln for International Paper:

> 4. Commencing in May of 2001, Plaintiff performed various work for the Defendant including the replacement of a lime kiln shell, the replacement of filler bars, resettting the base of a kiln, in addition to other work related to the kiln, together with all required and related supervision, equipment, tools, material, parts and labor.

Complaint at ¶ 4. This factual averment is incorporated by reference into both Phillips Kiln's claims for breach of contract and *quantum meruit*. Moreover, Phillips Kiln does not plead what portion of the work performed by it during this time period was done pursuant to the terms of the express contract between it and International Paper.

Notwithstanding the lack of specificity in its pleadings, Phillips Kiln asserts that it is not seeking to recover for the same services under both theories. Rather, Phillips Kiln contends that in its *quantum meruit* claim it is seeking to recover for "extra" services requested by International Paper after completion of the work called for in the written contract between the parties. Phillips Kiln points out that in its *quantum meruit* claim it alleges that: "At Defendant's request, Plaintiff provided services, together with related supervision, tools, materials, parts and labor, to the Defendant from May 2001 to July 2001." Complaint at ¶ 16. Phillips Kiln contrasts this language with that contained in its breach of contract claim in which it makes specific reference to "services covered under the contract based on Plaintiff's proposal." Complaint at ¶ 10. Phillips Kiln asserts that this difference in language demonstrates that the same work does not form the basis for both

its claims of breach of contract and *quantum meruit*. As courts have observed: "It is well settled that there may be an implied contract on a point not covered by an express one." *DeMuth Landscaping & Design v. Heggestad*, 461 N.W.2d 354, 356 (Iowa Ct. App. 1990) (quoting *Heninger & Heninger v. Davenport Bank and Trust*, 341 N.W.2d 43, 47 (Iowa 1983) (quoting in turn *Olberding Construction Co. v. Ruden*, 243 N.W.2d 872, 875 (Iowa 1976)); *accord Frontier Props. Corp. v. Swanberg*, 488 N.W.2d 146, 149-50 (Iowa 1992).

Remembering that a court must accept the complaint's factual allegations as true and construe them in the light most favorable to Phillips Kiln, *Botz*, 286 F.3d at 489; *Meyer*, 281 F.3d at 760; *Young*, 244 F.3d at 627; *Whitmore*, 204 F.3d at 784; *Anderson*, 192 F.3d at 1131; *Gross*, 186 F.3d at 1090; *Midwestern Mach.*, 167 F.3d at 441; *Valiant-Bey*, 829 F.2d at 1443, the court concludes that Phillips Kiln's factual allegations can be construed to indicate that Phillips Kiln is not claiming the same work as the basis for both its claims of breach of contract and *quantum meruit*, but is instead seeking, in its *quantum meruit* claim, to recover for services provided by it separate from the work called for in the written contract between the parties. Construed as such, the allegations in the complaint in this matter are similar to the facts found in *DeMuth Landscaping & Design*, 461 N.W.2d at 356 and *Frontier Props. Corp.*, 488 N.W.2d at 149-50.

In *DeMuth*, the defendant requested that the plaintiff submit a bid for landscaping on his property. The plaintiff submitted an estimate for the cost of the project. *DeMuth Landscaping & Design*, 461 N.W.2d at 355. However, before the plaintiff commenced work, damage to another part of the property occurred. The defendant requested that the plaintiff make repairs to this portion of the property in addition to the work the plaintiff had submitted the estimate on. *Id.* The plaintiff submitted a bill for all the work performed which was more than the original estimate. The defendant, however, would only pay the original estimate. The plaintiff brought suit on both express and implied contract theories, and prevailed on both. In affirming, the Iowa Court of Appeals noted that: "In the present

case, because the trial court found the original bid was only for the north side of the bank and did not cover the south side, a contract must be implied for work done on the south bank." *Id*. at 356.

Similarly, in *Frontier*, the plaintiff submitted an estimate for partial construction of a house at the defendant's request. *Frontier Props. Corp.*, 488 N.W.2d at 147. Subsequently, during the work on the house, the defendant requested "substantial additions" to the house. *Id.* When the defendant refused to make payment for the work performed, the plaintiff brought suit on both express and implied contract theories. In affirming the plaintiff's recovery under both theories, the Iowa Supreme Court observed:

> Here the district court found that the $61,400 estimate to complete the house did not include the additions earlier cited. There is substantial record evidence to support these findings. The electrical and plumbing subcontractors both testified that the home they bid on and the home that they actually constructed were two different things. There was likewise expert testimony as to the fair and reasonable cost for these additions. The Swanbergs put on no credible evidence to the contrary.
>
> We see no "double recovery" here. Frontier was entitled--as the district court correctly found--to recover under an implied contract theory for the fair and reasonable cost of these additions. This compensation was due Frontier in addition to the amount contemplated in the original $166,802 estimate to construct the "shell."

Id. at 150.

Here, because Phillips Kiln's factual allegations can be construed to indicate that Phillips Kiln is seeking, in its *quantum meruit* claim, to recover for services separate from the work called for in the written contract between the parties, the court concludes that the complaint contains sufficient allegations to give rise to a claim for *quantum meruit* that can coexist with an express breach of contract claim. Therefore, defendant International

Paper's motion to dismiss plaintiff Phillips Kiln's *quantum meruit* claim is denied.

2. Breach of contract and quantum meruit as alternative pleadings

Because the court has resolved International Paper's motion on the issue of whether the breach of contract and *quantum meruit* claims here are mutually exclusive, it is unnecessary for the court to consider Phillips Kiln's argument that it is entitled to plead both causes of action as separate alternative theories. Nonetheless, the court notes that courts of both Iowa and Pennsylvania have permitted parties to plead alternative theories of breach of express contract and implied contract or *quantum meruit*. *See Larry Pitt & Assocs. v. Long*, 716 A.2d 695, 703 (Pa. Commw. Ct. 1998) (holding that a plaintiff "is not restricted to an election of either a remedy for breach of contract or a remedy by way of quantum meruit."); *Maasdam v. Maasdam's Estate*, 24 N.W.2d 316, 320 (Iowa 1946) (noting that while "[o]ne seeking to recover solely on an express contract specific as to all of its terms cannot recover on an implied contract, or upon a *quantum meruit*, or vice versa. . . One may, of course, plead these causes of action in separate counts."); *Russell v. John Clemens & Co.*, 195 N.W. 1009, 1010 (1923) (noting that a party pleading his cause of action in alternative counts, even one on express contract and one on implied contract or *quantum meruit*, "is a familiar and unquestioned rule."); *Bowe v. Frink*, 114 N.W. 543, 543-44 (Iowa 1908) (noting that in an action for breach of an express contract for work and labor, plaintiff may add a count on quantum meruit); *cf.* IOWA R. CIV. P. 69(b) ("A party may also state as many separate claims or defenses as the party has regardless of consistency and whether based on legal or equitable grounds."). Thus, even if Phillips Kiln was seeking to recover for the same work under both its breach of contract and *quantum meruit* claims, Phillips Kiln could plead these two causes of action as separate, alternative theories of recovery in separate counts.

IV. CONCLUSION

The court concludes that the complaint, when construed in the light most favorable to Phillips Kiln, sets forth a claim for services performed which are separate from the work called for in the written contract between the parties. Thus, the court concludes that the complaint contains sufficient allegations to give rise to a claim for *quantum meruit* that can coexist with an express breach of contract claim. Therefore, defendant International Paper's motion to dismiss plaintiff Phillips Kiln's *quantum meruit* claim is **denied**.

IT IS SO ORDERED.

DATED this 3rd day of June, 2002.

Mark W. Bennett

MARK W. BENNETT
CHIEF JUDGE, U. S. DISTRICT COURT
NORTHERN DISTRICT OF IOWA